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2009 MAY 29 AM 10:07

STATE OF HAWAII
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HRD09/4347

May 26, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

RE: Request for comments on MMK Maui, LP's Surface Water Use Permit Application – Existing Uses, Nā Wai `Ehā Surface Water Management Areas, Maui.

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on MMK Maui, LP's (MMK) Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (*Waiāhole*) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54. Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, MMK should not have any priority simply by virtue of the fact that it filed its SWUPA earlier than other existing users.

Indeed, as a private commercial user who seeks to irrigate two golf courses (that it purchased for pennies on the dollar in 2004, *after* the IIFS Petition was filed), MMK's use should have the *last* priority

FILE ID:	SWUPA, 21866
DOC ID:	3829

for Nā Wai `Ehā water. Because its is for golf course irrigation, MMK's use is subject to a "higher level of scrutiny," see *Waiāhole*, 94 Hawai'i at 142, 161, 9 P.3d at 454, 473, and, in addition to justifying its use in light of the public trust, also has the "heavy burden" to show why stream water should be diverted out of its watershed of origin. *Id.* at 168, 9 P.3d at 480 (citing the Commission). MMK has not met that burden and OHA objects to its SWUPA.

In 1992, the Office of State Planning reported that these two golf courses (which were previously the Waikapū Golf Course and Sandalwood Golf Course) used a total of 1.2 million gallons per day of water. (See Exh. C-49 in IIFS contested case.) The superintendent of the golf courses testified at the IIFS contested case that, after installing a state of the art irrigation system to increase the irrigation efficiency, the golf courses used 1.2 mgd of water in 2006, but that was "more than normal" because in the early part of the year the grass was still coming in so MMK was "throwing a lot of water down." Now, MMK is asking for more water than it used when it was "throwing a lot of water down" and more water than used before it increased the efficiency of the irrigation system.

In addition to overstating its actual water needs, MMK has failed to show a lack of practicable mitigation or alternative water sources. An offstream diverter cannot meet the heavy burden make that showing simply by claiming that other alternatives "are cost prohibitive" with no analysis whatsoever, which is all that MMK has done. (Table 4.)

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians."¹ (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

‘O wau iho nō me ka ‘oia ‘i‘o,



Clyde W. Nāmu‘o
Administrator

¹ OHA is a party in the on-going `Iao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe`e, Waiehu, `Iao, and Waikapū Streams Contested Case Hearing (Case No. CCH-MA06-01) ("IIFS contested case") and has numerous beneficiaries have property interests in, and/or use surface water from, the the `Iao, Waihe`e, Waiehu, and Waikapū surface water management areas.

Laura Thielen and Ken Kawahara
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C: OHA CRC Maui

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